



**THE ATTORNEY GENERAL  
OF TEXAS**

July 20, 1987

**JIM MATTOX  
ATTORNEY GENERAL**

Robert Bernstein, M.D.  
Commissioner of Health  
Texas Department of Health  
1100 West 49th Street  
Austin, Texas 78756

Open Records Decision No. 472

Re: Whether the Open Records Act, article 6252-17a, V.T.C.S., requires the Texas Department of Health to disclose investigation of complaint made pursuant to section 12C(c) of article 4590f, V.T.C.S.

Dear Dr. Bernstein:

You have requested our decision under the Open Records Act, article 6252-17a, V.T.C.S. In pertinent part, your letter states:

The Texas Department of Health has received a written request for copies of all the records and investigation reports pertinent to the department's investigation of a complaint made pursuant to section 12C(c) of article 4590f, V.T.C.S. . . .

Among the records requested are items of information which Rhone-Poulenc, one of the subjects of the 4590f investigation, has claimed are confidential under the Open Records Act, sections 3(a)(4) and (10) exceptions. . . .

. . . . .

A pertinent part of article 4590f, section 7(b), reads as follows:

'Records copied pursuant to this section shall be public records, except that if a showing satisfactory to the Director is made by the owner of the records that the records divulge trade secrets if made public, then the Agency shall consider those copied records as confidential.'

The requestor of all the subject records has claimed orally that article 4590f, section 12C(c)

supersedes the exceptions of the Open Records Act.  
(Emphasis in original).

Your questions are as follows:

1. Does the Rhone-Poulenc information qualify for protection under either section 3(a)(4) information which, if released, would give advantage to competitors or bidders; or section 3(a)(10) trade secrets?
2. Does the Rhone-Poulenc information fall within the purview of article 4590f, section 7(b)?
3. Does an oral announcement of an intent to bring a citizen suit against the department under article 4590f, section 12C(d) act to protect the Rhone-Poulenc information under section 3(a)(3) of the Open Records Act?
4. Does the wording of article 4590f, section 12C(c) act to supersede any or all of the foregoing protective provisions?

Article 4590f, V.T.C.S., is a comprehensive statute dealing with the control of nuclear and radioactive material. Among other things, it designates the Texas Department of Health as the Texas Radiation Control Agency, section 4(a); authorizes the agency to provide by rule for the licensing of radioactive materials and equipment and to inspect public and private property to insure compliance with legal requirements, sections 6(a) and 7(a); authorizes litigation to effect its purposes, section 12C; and imposes civil and criminal penalties for violations of its provisions, sections 15, 15A.

The complaint which precipitated the department's investigation of Rhone-Poulenc was filed pursuant to section 12C(c) of article 4590f. This provision states:

A local government or person affected may file a written complaint with the Agency and request an investigation of an alleged violation by a person licensed under Section 6A or 6B of this Act. The Agency shall reply to the complaint in writing within sixty (60) days after receipt of the complaint and shall provide a copy of any investigation reports relevant to the complaint together with a determination of whether or not the alleged violation was committed. (Emphasis added).

After completing its investigation, the department prepared a report summarizing its findings. It sent this report to the complainant in the form of a letter dated December 22, 1986.

During its investigation, the department collected from Rhone-Poulenc documents containing information regarding company operations. After receiving the department's investigative report, the complainant requested copies of all such documents. His letter to the department, dated January 12, 1987, stated in relevant part:

I hereby request . . . that all of the records and investigation reports be made immediately available for copying. Section 12C(c) of Article 4590f requires that 'any investigation reports' be supplied to the requesting party along with the determination of whether or not any alleged violations occurred within the 60 day period for response. By withholding the underlying reports supporting your response to our request, the Department of Health is in violation of Article 4590f. (Emphasis in original).

Rhone-Poulenc has asserted a confidentiality interest in some information contained in these documents. In a letter dated December 17, 1986, counsel for the company advised the department that it considered the following five items of information to be "trade secrets": the number of purchases, amounts involved and names of purchasers of uranium; the volumes of ores processed at the Freeport, Texas plant; the total quantity of uranium produced; Rare Earth production unit material balance; and the number of truckloads of byproduct material generated. In a recent letter to this office, however, counsel modified this claim:

Rhone-Poulenc Inc. is revising its claims of confidentiality so as to exclude waste shipment records between its Freeport plant and the Conquista tailings pond.

. . . . .

Henry & Kelly cite to you one document, the 1985 C.D. Rao memo, which Rhone-Poulenc still claims to contain, at least in part, trade secret process information. The C.D. Rao memo was prepared by an agency employee following his privileged inspection of the plant under the authority of the Texas Radiation Control Act. . . .

. . . . .

Rhone-Poulenc still asserts its confidentiality claims, however, with respect to internal process information as well as its uranium product shipments, neither of which relate to the Conquista tailings pond.

On the basis of this letter, we understand that the information that Rhone-Poulenc now wishes to protect consists of the Rao memorandum, which is included in a packet of materials submitted to us under the heading "Attachment 2," and a separate group of documents labelled "Attachment 4." We shall therefore consider the availability of only this information.

As noted, the complaint that precipitated the agency's investigation of Rhone-Poulenc was submitted under section 12C(c) of article 4590f. To investigate this complaint, the agency had to obtain information concerning company operations. It found its authority to do so in section 7 of article 4590f, which provides in relevant part:

(a) The Agency or its duly authorized representatives shall have the power to enter at all reasonable times upon any private or public property for the purpose of determining whether or not there is compliance with or violations of the provisions of this Act and rules, licenses, registrations, and orders issued thereunder, except that entry into areas under the jurisdiction of the Federal Government shall be effected only with the concurrence of the Federal Government or its duly designated representative.

(b) The authorized agents or employees of local governments may have access to examine and copy at their expense during regular business hours any records pertaining to activities licensed under Section 6B of this Act, subject to the limitations of [the Open Records Act]. Records copied pursuant to this section shall be public records, except that if a showing satisfactory to the Director is made by the owner of the records that the records divulge trade secrets if made public, then the Agency shall consider those copied records as confidential. . . . (Emphasis added).

Pursuant to this section, the Department of Health obtained from Rhone-Poulenc documents containing the information that the company

now seeks to withhold. You have asked if this information is within the "trade secrets" protection afforded by section 7(b). The answer depends initially on how the underscored phrase "authorized agents or employees of local governments" is construed. Section 3(5) of the act defines "local government" as "a county, an incorporated city or town, a special district, or other political subdivision of the state." If the term "authorized agents" in section 7(b) means an authorized agent of a "local government," then section 7(b) cannot apply in this instance: under this interpretation, section 7(b) could protect only information collected on behalf of a local government, and the Department of Health is not in this category. If, on the other hand, the term refers to the "duly authorized representatives" of "the Agency" mentioned in section 7(a), then section 7(b) can apply here. This section would extend the possibility of trade secrets protection to records obtained by employees of local governments or by the authorized agents of the Department of Health.

The legislative history of section 7 sheds some light on this issue of statutory construction. The present version of sections 7(a) and (b) was enacted in 1981. Acts 1981, 67th Leg., ch. 21, at 31. Before then, section 7 consisted entirely of a slightly different version of what is now section 7(a). The bill analysis to Senate Bill No. 480, which enacted the current version of sections 7(a) and (b), states that

[i]nspection has been expanded to provide access to records of licensed activities under the Act, subject to protection given by the Open Records Act, and making reasonable access provisions consistent with those of the Solid. . . .

Bill Analysis to S.B. No. 480, prepared for Senate Committee on Environmental Affairs, filed in Bill File to S.B. No. 480, Legislative Reference Library. Although this statement is incomplete, we assume that it was intended to refer to the Solid Waste Disposal Act, article 4477-7, V.T.C.S. Section 7 of that act contains language resembling that of sections 7(a) and (b) of article 4590f. In particular, it states:

(a) The authorized agents or employees of the department, the commission, and local governments have the right to enter at all reasonable times in or upon any property . . . for the purpose of inspecting and investigating conditions relating to solid waste management and control. . . .

(b) The authorized agents or employees of the department and the commission may have access to, examine, and copy during regular business hours

any records pertaining to hazardous waste management and control.

This section confers on the authorized agents of the department both the right to enter property to investigate conditions relating to solid waste management and control and the right to obtain records pertaining to such management and control. If, as the bill analysis to Senate Bill No. 480 indicates, the purposes of sections 7(a) and (b) of article 4590f were to expand the right of access to records of activities licensed under that article and to make the access provisions of the statute consistent with those of the Solid Waste Disposal Act, it follows that section 7(b) must be read as permitting the authorized agents of the Department of Health as well as employees of local governments to have access to the records described therein. This is, moreover, the only interpretation that seems reasonable. It would hardly make sense for the legislature to designate the Department of Health as the entity with the responsibility of enforcing article 4590f but deny to it the right to obtain records pertaining to the activities that it is supposed to investigate.

We therefore conclude that section 7(b) of article 4590f applies to authorized agents of the Department of Health as well as to employees of "local governments" as defined in section 3(a) of the act. The next question is whether the information at issue here is within the "trade secrets" protection afforded by section 7(b).

Section 7(b) provides that "if a showing satisfactory to the Director is made by the owner of the records" obtained by the department "that the records divulge trade secrets if made public, then the Agency shall consider those copied records as confidential." The section does not, however, list criteria for the Director to use in making this determination. Prior decisions of this office set forth the standards that we use in making trade secrets determinations, see, e.g., Open Records Decision No. 426 (1985), and it may be that the proper interpretation of section 7(b) is that the Director is to rely on these standards in making his trade secrets determinations. We need not resolve this issue, however, because the information contained in our file on this request convinces us that our trade secrets criteria have been satisfied here. Whether this information could qualify as trade secrets under any less stringent standards that might be developed by the Director, therefore, is immaterial.

Open Records Decision No. 426 (1985) establishes that decisions as to whether information constitutes a trade secret are to be made by relying on these criteria:

- (1) the extent to which the information is known outside [the owner's] business; (2) the extent to which it is known by employees and others involved

in [the owner's] business; (3) the extent of measures taken by [the owner] to guard the secrecy of the information; (4) the value of the information to [the owner] and to [its] competitors; (5) the amount of effort or money expended by [the owner] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

In his letter to the department, dated December 17, 1986, counsel for Rhone-Poulenc stated:

With the exception of knowledge acquired by governmental agency staff personnel in carrying out their regulatory functions, the foregoing information is not believed to be known by persons outside the employment of Rhone-Poulenc Inc. Within Rhone-Poulenc Inc., this information is not disseminated to all employees but rather is limited to those with a 'need to know' in order to carry out company operations. The information is kept in files at the plant where access is restricted and full 24-hour, 7-day per week security is provided.

If the foregoing information was made available to Rhone-Poulenc Inc.'s competitors, it would compromise process and customer advantages Rhone-Poulenc Inc. has developed in the marketplace, jeopardizing Rhone-Poulenc Inc.'s rare earths business, now valued in excess of \$100,000,000. Competitor knowledge of the foregoing information could certainly harm the Freeport, Texas plant operation (valued in excess of \$30,000,000), quite possibly threatening its continued profitability. We therefore consider the foregoing information as valuable trade secrets worth millions of dollars. As for the amount of money spent to develop Rhone-Poulenc Inc.'s processes, you should be advised that the company in recent years has spent \$5,000,000 to \$6,000,000, per year on research and development related to the rare earth business.

We know of no legal means by which our competitors could acquire this information. As far as we know, it is not available in public files or trade journals. Furthermore, this type of information cannot be discerned from adjoining property or from aerial photography. We therefore

feel that our competitors currently have no legal means of acquiring or duplicating the foregoing trade secret information.

These arguments justify the conclusion that the information at issue here qualifies as trade secrets.

The next question is whether section 12C(c) of article 4590f requires the release of this information, notwithstanding its trade secrets status. Counsel for the organization which filed this complaint argues that the section 12C(c) requirement that complainants be given "a copy of any investigation reports relevant to the complaint" means that all such reports must be released even if their contents are otherwise protected from required disclosure. We disagree.

It is an elementary rule of statutory construction that all sections of a statute must be considered together, and that one provision will not be given a meaning inconsistent with that of other provisions even though, standing alone, it might be susceptible of such construction. Black v. American Bankers Ins. Co., 478 S.W.2d 434 (Tex. 1972). This rule requires us to interpret section 12C(c) in light of section 7(b). We have held that under the latter section, the Rhone-Poulenc information at issue here qualifies as protected trade secrets, and is therefore to be regarded as confidential by the agency. To interpret section 12C(c) as requiring the release of this information, notwithstanding its confidential status, would effectively render section 7(b) a nullity. For this reason, we cannot interpret section 12C(c) in this manner.

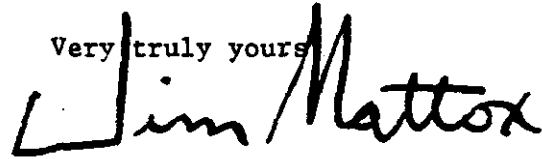
Section 12C(c) requires the release of "investigative reports relevant to the complaint." (Emphasis added). The information at issue here is contained in appendices attached to the department's report, and therefore arguably does not comprise part of the "report" to which section 12C(c) refers. For the foregoing reasons, however, we conclude that this information is protected by the trade secrets provision of section 7(b), and that it should therefore not be released by the department regardless of whether it may be characterized as part of a section 12C(c) report.

#### S U M M A R Y

The information at issue here is within the trade secrets protection of section 7(b) of article 4590f, V.T.C.S. Accordingly, whether or not it is part of an "investigative report" as that term is used in section 12C(c) of article 4590f, V.T.C.S., this information is not subject to required disclosure.



Very truly yours

A handwritten signature in black ink that reads "Jim Mattox". The signature is written in a cursive, slightly slanted style. The first name "Jim" is written in a smaller, more compact script, while "Mattox" is written in a larger, more flowing script with a prominent loop at the end of the "x".

J I M   M A T T O X

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